

1 Pro se pleadings must, however, be liberally construed. Balistreri v. Pacifica Police Dep't, 901
2 F.2d 696, 699 (9th Cir. 1988).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
4 elements: (1) that a right secured by the Constitution or laws of the United States was violated,
5 and (2) that the alleged deprivation was committed by a person acting under the color of state
6 law. West v. Atkins, 487 U.S. 42, 48 (1988).

7 B. Plaintiff's Claim

8 Plaintiff alleges that he was falsely accused of refusing to be double celled and making
9 threats against potential cellmates. He alleges that as a result of a disciplinary hearing on
10 December 28, 2004, defendants placed him in a disciplinary punishment "c/c" group status
11 without proper due process considerations and, as a result, suffered atypical hardships.
12 Specifically, he claims that he was (1) denied advanced written notice of charges at least 24
13 hours before the hearing and was not issued an infraction form; (2) denied the opportunity to
14 appear at the hearing to call witnesses and present evidence; and (3) denied a written statement
15 by factfinder as to evidence relied upon for its decision. Liberally construed, plaintiff has stated
16 a cognizable claim of a violation of his Fourteenth Amendment right to due process. The court
17 will order service of the complaint based on the cognizable claim described above.

18 **CONCLUSION**

19 1. The clerk of the court shall issue summons and the United States Marshal shall
20 serve, without prepayment of fees, a copy of the complaint, all attachments thereto, and a copy
21 of this order upon: **Committee Chairpersons D. Swearingen, T. Lucarelli, and M. Foss** at
22 **Pelican Bay State Prison in Crescent City, California**. The clerk shall also mail a courtesy
23 copy of this order and the complaint, with all attachments thereto, to the **California Attorney**
24 **General's Office**.

25 3. No later than **ninety (90) days** from the date of this order, defendants shall file a
26 motion for summary judgment or other dispositive motion with respect to the claims in the
27 complaint as set forth above, or notify the court that they are of the opinion that this case cannot
28 be resolved by such a motion.

1 a. If defendant elects to file a motion to dismiss on the grounds that plaintiff
2 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
3 defendant shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315
4 F.3d 1108, 1119-20 (9th Cir. 2003).

5 b. Any motion for summary judgment shall be supported by adequate factual
6 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
7 Procedure. **Defendant is advised that summary judgment cannot be granted, nor qualified**
8 **immunity found, if material facts are in dispute. If any defendant is of the opinion that this**
9 **case cannot be resolved by summary judgment, he shall so inform the court prior to the**
10 **date the summary judgment motion is due.**

11 4. Plaintiff's opposition to the dispositive motion shall be filed with the court and
12 served on defendant no later than **thirty (30) days** from the date defendant's motion is filed.

13 a. In the event defendant files an unenumerated motion to dismiss under
14 Rule 12(b), plaintiff is hereby cautioned as follows:¹

15 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
16 the Federal Rules of Civil Procedure, on the ground you have not exhausted your
17 administrative remedies. The motion will, if granted, result in the dismissal of
18 your case. When a party you are suing makes a motion to dismiss for failure to
19 exhaust, and that motion is properly supported by declarations (or other sworn
20 testimony) and/or documents, you may not simply rely on what your complaint
21 says. Instead, you must set out specific facts in declarations, depositions, answers
22 to interrogatories, or documents, that contradict the facts shown in the defendant's
23 declarations and documents and show that you have in fact exhausted your
24 claims. If you do not submit your own evidence in opposition, the motion to
25 dismiss, if appropriate, may be granted and the case dismissed.

26 b. In the event defendant files a motion for summary judgment, the
27 Ninth Circuit has held that the following notice should be given to plaintiffs:

28 The defendants have made a motion for summary judgment by which
they seek to have your case dismissed. A motion for summary judgment under
Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for
summary judgment. Generally, summary judgment must be granted when there is

¹The following notice is adapted from the summary judgment notice to be given to pro se
prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 no genuine issue of material fact--that is, if there is no real dispute about any fact
2 that would affect the result of your case, the party who asked for summary
judgment is entitled to judgment as a matter of law, which will end your case.
3 When a party you are suing makes a motion for summary judgment that is
properly supported by declarations (or other sworn testimony), you cannot simply
4 rely on what your complaint says. Instead, you must set out specific facts in
declarations, depositions, answers to interrogatories, or authenticated documents,
5 as provided in Rule 56(e), that contradict the facts shown in the defendants'
declarations and documents and show that there is a genuine issue of material fact
6 for trial. If you do not submit your own evidence in opposition, summary
judgment, if appropriate, may be entered against you. If summary judgment is
7 granted in favor of defendants, your case will be dismissed and there will be no
trial.

8
9 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
10 Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317
11 (1986) (holding party opposing summary judgment must come forward with evidence showing
12 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
13 failure to file an opposition to defendant's motion for summary judgment may be deemed to be a
14 consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff
15 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam).

16 5. Defendant shall file a reply brief no later than **fifteen (15) days** after plaintiff's
17 opposition is filed.

18 6. The motion shall be deemed submitted as of the date the reply brief is due. No
19 hearing will be held on the motion unless the court so orders at a later date.

20 7. All communications by the plaintiff with the court must be served on defendant,
21 or defendant's counsel once counsel has been designated, by mailing a true copy of the
22 document to defendant or defendant's counsel.

23 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
24 No further court order is required before the parties may conduct discovery.

25 For plaintiff's information, the proper manner of promulgating discovery is to send
26 demands for documents or interrogatories (questions asking for specific, factual responses)
27 directly to defendants' counsel. See Fed. R. Civ. P. 33-34. The scope of discovery is limited to
28 matters "relevant to the claim or defense of any party . . ." See Fed. R. Civ. P. 26(b)(1).

1 Discovery may be further limited by court order if “(i) the discovery sought is unreasonably
2 cumulative or duplicative, or is obtainable from some other source that is more convenient, less
3 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by
4 discovery in the action to obtain the information sought; or (iii) the burden or expense of the
5 proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2). In order to comply
6 with the requirements of Rule 26, before deciding to promulgate discovery plaintiff may find it
7 to his benefit to wait until defendants have filed a dispositive motion which could include some
8 or all of the discovery plaintiff might seek. In addition, no motion to compel will be considered
9 by the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and N.D. Cal. Local
10 Rule 37-1 has been satisfied. Because plaintiff is detained, he is not required to meet and confer
11 with defendants in person. Rather, if his discovery requests are denied and he intends to seek a
12 motion to compel he must send a letter to defendants to that effect, offering them one last
13 opportunity to provide him with the sought-after information.

14 9. It is plaintiff’s responsibility to prosecute this case. Plaintiff must keep the court
15 and all parties informed of any change of address and must comply with the court’s orders in a
16 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
17 pursuant to Federal Rule of Civil Procedure 41(b).

18 IT IS SO ORDERED.

19 DATED: 10/10/08



RONALD M. WHYTE
United States District Judge